Mass Torts

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NSF: The Man-Made Disease, the Litigation Swell, and the Lives Lost

By Jason Edward Ochs


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It was a crisp morning on the central coast of California in the fall of 2007. The sun was bright, the ocean glittered in the distance, my windows were down, and I was on my way to meet a client with this new disease I knew very little about. I had heard of nephrogenic systemic fibrosis (NSF) while in Chicago during the summer of 2007. I could barely pronounce the disease, but I knew it had something to do with renal impairment, the dye they inject during a magnetic resonance imaging (MRI) procedure, and some type of condition that was described as "turning you into a statue."

At the time, it seemed pretty dramatic, even though my imagination could not grasp what it would be like to become a statue. It would not be long until I would realize how little I knew and what I was about to embark on, which would include ongoing multi-district litigation against four major pharmaceutical companies, the deaths of newfound friends, and heartbreaking pain like I had never seen.

I pulled up to a small one-story, pale green duplex. I parked my car next to a small beat-up pickup on the side of the road, grabbed some papers, and walked toward the door on the left side of the driveway. It was a rundown neighborhood full of cookie-cutter duplexes that were in desperate need of fresh paint and a tree-trimming service.

I rang the doorbell and heard someone shuffle behind the door. An angry cat hissed from within. I could hear a motorized cart of some sort travel towards me on the other side of the door. The lock jiggled and made some noise for what seemed like minutes as I stood there uncomfortably, not sure who was about to open the door.

I cried out "hello?" There was no answer and just louder jiggling of the lock. I could feel slight perspiration on my forehead. It was warm out, but I knew the sweat was from the situation and not the heat. Just as I started wondering how long I should actually stand there, the door sounded "click."

I stood there waiting for the door to open, but after what seemed like minutes of clanking and brass jiggling, it was oddly silent. I heard nothing—no motor, no noise—pure silence. I looked around the neighborhood, carefully surveying my surroundings, which I had failed to do earlier. I wiped my forehead with my coat sleeve. I could feel my heart rate increase.

"Hello?" I said in more of a reluctant manner than any lawyer would ever want to admit. "Open the door and come in," replied a week female voice from within. I turned the brass knob and slowly pushed the door open. I looked eye level into the home and saw nothing. Then I caught a glimpse of a person sitting in a motorized

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Message from the Cochairs

We continue our progress toward the goals established in the Committee's three-year plan, which is guiding our collective efforts with concrete milestones. The recent Joint CLE Seminar, cosponsored by the Mass Torts, Environmental Litigation, and Products Liability Committees, in Beaver Creek, Colorado, was a success, with the Mass Tort Committee making both plenary and breakout presentations. We are currently working to get the planning committee moving forward on its plans for the 2011 Joint CLE Seminar.

Substantive subcommittees have made commitments to produce two or more articles for the newsletter per year. This commitment is expected to lead us to our stated objective of producing a newsletter with 100 percent original content. The Committee's website also continues to improve, with newer content and additional regular updates, being driven by the leadership of the Website Subcommittee.

Finally, we are excited for the Section Annual Conference, scheduled for April 21–23, in New York City. Attendance at this conference is required for all committee and subcommittee cochairs, but we ask all of the members of the Mass Tort Committee to make this commitment as well. We look forward to seeing you there! ■

Procedural Misjoinder: A New Avenue to Federal Court?

By Stacey L. Drentlaw


Stacey L. Drentlaw

A new removal doctrine known as fraudulent or procedural misjoinder[1] is used to remove cases where multiple plaintiffs or multiple defendants are joined as parties in a way that defeats the complete diversity requirement necessary for removal to federal court under 28 U.S.C. § 1332. For example, imagine a medical device lawsuit involving 50 plaintiffs, one plaintiff from each of the 50 states, including Delaware and Minnesota. The defendant is a Delaware corporation with its principal place of business in Minnesota. Each plaintiff alleges that he or she was injured by the manufacturer's devices, which were used by different doctors in different hospitals. Because two of the 50 plaintiffs are from the same state as the defendant, a traditional diversity-based removal is precluded unless the doctrine of procedural misjoinder is applied. Similarly, picture a lawsuit involving plaintiffs from California and Nevada who have sued a Nevada-based casino for an alleged personal injury that occurred while plaintiffs were gambling in the casino. The plaintiffs have also sued a Florida-based Internet gambling website for alleged misrepresentations related to the gaming site. Unless a court applies procedural misjoinder, removal by the Florida defendant is precluded because plaintiffs have destroyed diversity by joining their claims against the Florida casino with unrelated claims against the Nevada casino. Under the doctrine of procedural misjoinder, the cases described above could be removed to federal court, where the court would sever and remand (or dismiss) the non-diverse parties and then retain the remaining diverse parties in federal court.

The procedural misjoinder doctrine has received mixed reviews by the federal courts. While some courts and commentators have embraced the doctrine, others have rejected it as an attempt to judicially expand federal jurisdiction. These critics suggest that the proper venue for challenging the improper joinder of parties or claims is in state court. Even in jurisdictions where the procedural misjoinder doctrine has been adopted, there are open issues, including whether state or federal joinder rules should be considered when evaluating the misjoinder and whether an improper motive for the misjoinder is necessary.

This article examines the origins of the procedural misjoinder doctrine and some of the cases that have adopted and rejected it. The article then addresses practical issues that accompany the doctrine, including when and where misjoinder should be challenged, which joinder rules should be used in evaluating a removal based on procedural misjoinder, and whether an improper motive is required for removal under the procedural misjoinder doctrine.

Procedural Misjoinder versus Fraudulent Joinder

Procedural misjoinder is a related but distinct concept from the traditional fraudulent joinder theory of removal. In a fraudulent joinder situation, the plaintiff sues a diverse defendant in state court and then joins a non-diverse defendant against whom the plaintiff has no reasonable basis for a claim. For example, the plaintiff sues a diverse drug manufacturer and joins a non-diverse physician against whom the statute of limitations has expired in an effort to keep the case in state court. By contrast, the plaintiff in a procedural misjoinder case sues a diverse defendant in state court and adds a claim against a non-diverse defendant. The plaintiff has a reasonable basis for the claim against the non-diverse defendant, but the two claims have little or nothing to do with each other, in violation of federal and/or state joinder rules, which require that claims joined in a single action must arise out of the same transaction or occurrence and involve a question of law or fact common to all plaintiffs.[2] While fraudulent joinder is well-established and regularly utilized, the newer concept of procedural misjoinder continues to be a somewhat controversial doctrine with some unique practical issues that must be considered.

Cases Adopting Procedural Misjoinder

In the years after *Tapscott*, a number of federal district courts have found that procedural misjoinder provides a proper basis for removal to federal court and for the exercise of federal jurisdiction. Courts adopting the procedural misjoinder doctrine have found that plaintiffs should not be permitted to purposefully attempt to defeat removal by joining together parties where the presence of one would defeat removal and where in reality there is no sufficient nexus between the claims to satisfy permissive joinder statutes.[3] The procedural misjoinder rule "is a logical extension of the established precedent that a plaintiff may not fraudulently join a defendant in order to defeat diversity jurisdiction in federal court."[4]

Courts applying procedural misjoinder have done so in situations where both plaintiffs and defendants have been misjoined. For example, in a 41-plaintiff complaint, which included plaintiffs from 14 different states, several of whom were citizens of the same state as some of the defendants, the United States District Court for the Eastern District of Arkansas found that the non-diverse plaintiffs were procedurally misjoined and dropped them from the complaint so that federal jurisdiction existed for the remaining claims.[5] The court applied state joinder rules,

finding that the joinder of 41 plaintiffs did not meet the state law requirements, because their claims did not arise out of the same transaction or occurrence and did not present a common question of law or fact.[6] "The only thing common among Plaintiffs is that they took an HRT drug—but not even the same HRT drug. Plaintiffs are residents of different states and were prescribed different HRT drugs from different doctors, for different lengths of time, in different amounts, and suffered different injuries." The court further held that "'[t]o simply group the plaintiffs by judicial district or to simply group them primarily for filing convenience [does] not satisfy the terms required in Rule 20 nor the purpose' of Rule 20."[7] The court also noted that the misjoinder of plaintiffs "interfere[d] with the [MDL] court's ability to administrate [the] case for pretrial purposes."[8] Because the plaintiffs were procedurally misjoined, the court dismissed the non-diverse plaintiffs without prejudice and denied plaintiffs' motion to remand the entire action to state court.

As noted, procedural misjoinder can be utilized in cases involving misjoined defendants as well as misjoined plaintiffs. In *Ashworth v. Albers Medical, Inc. et al.,*[9] the federal court applied the doctrine of procedural misjoinder in a case involving misjoined defendants. The single plaintiff complaint included claims against several diverse pharmaceutical manufacturers, marketers, and distributors related to the plaintiff's alleged ingestion of counterfeit medications that entered the stream of commerce. The complaint also contained claims against a non-diverse pharmacy related to the pharmacy's alleged failure to provide complete copies of plaintiff's medical records, as required by a state statute. The court held that joinder was not proper because the plaintiff's claims against the non-diverse pharmacy, which required "a request for medical records and a refusal by the health care provider to comply with such request . . . [were] legally and factually too remote to sustain joinder" under federal or state joinder laws with the claims against the diverse defendants, which concerned the distribution of counterfeit tablets.[10] The court struck plaintiff's claim against the pharmacy from the complaint and denied plaintiff's motion to remand with regard to the remaining defendants.

Courts adopting procedural misjoinder have utilized both state and federal joinder rules and applied different standards about the nature of the misjoinder itself. Some courts have applied procedural misjoinder in any case where there is misjoinder under the state or federal rules of civil procedure, while other courts have required egregious misjoinder, as referenced in *Tapscott*. Thus, although a number of courts have adopted procedural misjoinder, there is a lack of clarity regarding how it should be applied. This lack of clarity, as well as other factors, have been cited by the courts that have refused to adopt the procedural misjoinder doctrine.

Cases Rejecting Procedural Misjoinder

Courts have rejected procedural misjoinder in cases involving allegedly misjoined defendants and misjoined claims

The Origin of the Doctrine of Procedural Misjoinder

The doctrine of procedural misjoinder was first adopted by the Eleventh Circuit Court of Appeals in *Tapscott v. MS Dealer Service Corporation.*[i] In *Tapscott*, the plaintiffs filed a putative class action in state court against two groups of defendants: (1) defendants who were involved in the sale of service contracts for automobiles sold and financed in Alabama; and (2) defendants who were involved in the sale of extended service contracts in connection with retail products.[ii] Several of the named plaintiffs, including plaintiffs Davis and West, were residents of Alabama. Some of the defendants in the automobile claims were also Alabama residents, while Lowe's Home Centers, Inc. (Lowe's), the only defendant in the retail product claims, was a North Carolina resident. Although Alabama plaintiffs Davis and West were diverse from North Carolina defendant Lowe's, traditional diversity was lacking because of the Alabama-based automobile defendants.

In a procedural move that resulted in the creation of the procedural misjoinder doctrine, Lowe's removed the action to federal court, asserting diversity jurisdiction under 28 U.S.C. § 1332, and also filed a motion to sever the claims against Lowe's from the claims against the automobile defendants. The district court granted the motion to sever, denied the plaintiffs' motion to remand the claims against Lowe's, and remanded the remaining claims against the automobile defendants to state court.[iii]

The Eleventh Circuit affirmed the district court's decision, finding that Federal Rule of Civil Procedure 20, which governs permissive joinder, did not authorize the joinder of Lowe's, a retail product defendant, with the automobile defendants. Joinder of defendants under Rule 20 is permissible when there is (1) a claim for relief asserting joint, several, or alternative liability and arising from the same transaction, occurrence, or series of transactions or occurrences; and (2) a common question of law or fact. Fed. R. Civ. P. 20(a). Per the Eleventh Circuit, "the district court correctly found no allegation of joint liability or any allegation of conspiracy. Further, the alleged transactions involved in the 'automobile' class are wholly distinct from the alleged transactions involved in the 'merchant' class."[iv]

Misjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action. A defendant's

and misjoined plaintiffs. These courts have cited a number of rationales for declining to adopt the doctrine. One of the most common reasons cited by courts rejecting procedural misjoinder is that the doctrine constitutes an improper expansion of federal jurisdiction. "[C]reating a new doctrine having the effect of expanding the removability of state court cases that, on their face, do not fall within the limited jurisdiction of the federal courts is neither wise nor warranted."[11] Courts citing this rationale when rejecting the procedural misjoinder doctrine have noted that "federal courts must apply the removal statutes in a manner that carries out the intent of Congress to restrict removal, and that cases should be remanded if jurisdiction is doubtful."[12]

Courts rejecting procedural misjoinder have found that the issue of procedural misjoinder should be addressed by the state court prior to removal. Defendants should move to sever the parties and/or claims that they believe to be misjoined in state court, and then remove the case following a state court decision severing the non-diverse claims. As noted by one federal court,

> the better course of action is for the state court to rule on the propriety of joinder under the state's joinder law in the first instance. The state court is also then in a position to potentially address a motion to sever the parties and claims for further proceedings.[13]

Courts rejecting procedural misjoinder have also cited to confusion regarding the standard that should be applied by the federal court when addressing removed claims, including whether misjoinder must be egregious, whether there is an improper motive behind the joinder, whether the parties or claims are merely misjoined (or something in between), and whether state or federal joinder rules should be applied to evaluate the joined claims.[14]

Practical Issues

Courts adopting and rejecting procedural misjoinder have identified several practical issues that courts must address when analyzing cases removed under the doctrine. These issues, which must be addressed when briefing procedural misjoinder removals, include when and where alleged misjoinder should be addressed, whether state or federal misjoinder rules should be applied, and what standard should be applied when evaluating allegedly misjoined claims.

As noted, several courts that have rejected procedural misjoinder have held that the appropriate venue for addressing misjoined claims is in state rather than federal court. Once a state court severs improperly joined claims, defendants can remove the case. While this approach holds some practical appeal, federal removal statutes may make this strategy dangerous for defendants. Per 28 U.S.C. § 1446, a removal petition must be filed within 30 days of service of a state court complaint if the case is removable as pleaded or within 30 days after a change in the case that makes it removable.[15] Removal based on a change in the state court case has typically "been limited to voluntary changes made by the

"right to removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." Although certain putative class representatives may have colorable claims against resident defendants in the putative "automobile" class, these resident defendants have no real connection with the controversy involving Appellants Davis and West and Appellee Lowe's in the putative "merchant" class action.[v]

Since the Eleventh Circuit's decision in *Tapscott*, the doctrine of procedural misjoinder has received mixed reviews. Although they have not expressly adopted the doctrine, the Fifth and Ninth Circuits have issued decisions favorably citing *Tapscott's* language regarding procedural misjoinder.[vi] The Eighth Circuit has also addressed the procedural misjoinder doctrine, remanding the claims at issue to state court without making any "judgment on the propriety of the doctrine in this case" and declining to "either adopt or reject it at this time."[vii] Numerous district courts have considered procedural misjoinder, with decisions coming down on both sides of the issues. The United States Supreme Court has not yet reviewed the doctrine.

Endnotes

i. Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996), overruled on other grounds, Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000).

ii. The second amended complaint named three retail defendants. Two were dismissed by the plaintiffs, leaving Lowe's Home Center, Inc. as the only retail defendant. 77 F.3d at 1355, n.1.

iii. *Id*. at 1355.

iv. *Id.* at 1360.

v. *Id.*

vi. *In re* Benjamin Moore & Company, 309 F.3d 296 (5th Cir. 2002), *mandamus denied on reh'g*, 318 F.3d 626, 631 (5th Cir. 2002) ("[W] ithout detracting from the force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction, we do not reach its application in this case"); California Dump Truck Owners Ass'n v. Cummins Engine Co., Inc., 24 Fed. Appx. 727, 729 (9th Cir. 2001) ("For purposes of discussion we will assume, without deciding, that this circuit would accept the doctrines of fraudulent and egregious joinder as applied to plaintiffs.")

vii. Kirkland et al. v. Wyeth et al., Eighth Circuit Court of Appeals, No. 09-1205 (consolidated with Jasperson et al. v. Wyeth et al., No. 09-1250 and Allen et al. v. Wyeth et al., No. 09-1373) (Jan. 6, 2010, slip op. at 15).

plaintiff, such as the voluntary addition of a federal question or the voluntary dismissal of a non-diverse party."[16] Severance in state court that has been opposed by plaintiffs may not be considered a voluntary change so as to trigger a new removal period. A second potential issue with seeking severance in state court is that the removal statutes provide that a case removed based on federal diversity jurisdiction must be removed within one year of the time the suit is filed in state court.[17] It is possible that a state court would take more than one year to address a defendant's motion to sever, resulting in a defendant's missing of the one-year removal window.

Another practical consideration courts must address is whether state or federal joinder rules should be applied when analyzing alleged misjoinder of claims or parties. Although the joinder rules of many states mirror federal joinder rules, some state rules differ significantly from the federal rules, and some state courts apply joinder rules more broadly than federal courts do. Courts looking to state joinder law have done so because state joinder rules are used in evaluating whether there is a reasonable basis for the state law claim against a non-diverse defendant in the more traditional fraudulent joinder removals.[18] These courts hold that "if the joinder of multiple plaintiffs is not improper under state law, it cannot be deemed a fraudulent or egregious effort to avoid federal jurisdiction." Other courts have applied federal rules because they are identical to the state rules at issue or have applied the federal rules without analysis.[19]

An additional consideration with which courts have grappled is the appropriate standard for evaluating whether claims or parties have been procedurally misjoined. The Eleventh Circuit's *Tapscott* decision, which initially adopted the procedural misjoinder doctrine, required that misjoinder be egregious: "We do not hold that mere misjoinder is fraudulent joinder, but we do agree with the district court that Appellants' attempt to join these parties is so egregious as to constitute fraudulent joinder."[20] While a number of courts have followed *Tapscott's* standard, a clear definition of "egregious" has not been adopted.[21] Courts have "defined" egregious as "totally unsupported," "unreasonable, and patently wanting in any colorable basis," "the absence of a 'palpable connection' between the claims asserted against diverse and non-diverse defendants," "collusive," and "characterized by 'bad faith.'"[22] The Eighth Circuit, while not defining egregious, held that "absent evidence that plaintiffs' misjoinder borders on a 'sham,'" it would not apply *Tapscott's* misjoinder doctrine.[23] Other courts have held that misjoinder need not be egregious: Mere misjoinder is sufficient to support removal jurisdiction.[24] Parties attempting to remove cases based on procedural misjoinder will likely have to brief these issues, particularly in courts addressing procedural misjoinder for the first time.

Conclusion

Procedural misjoinder is a potentially viable avenue to federal courts in cases where multiple plaintiffs or multiple defendants are involved. However, the doctrine has received mixed reviews, and the road is not without potential barriers. Defendants considering a procedural misjoinder-based removal should carefully review applicable case law and the potential issues a court will consider prior to utilizing the doctrine. ■

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Endnotes

1. Courts and commentators have used both phrases to describe this removal doctrine. "Procedural misjoinder" will be used in this article.

2. *See, e.g.,* Fed. R. Civ. P. 20(a), which provides that plaintiffs may join in one action as plaintiffs if "(A) they assert any right of relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action." Many states have similar or identical joinder statutes or rules. Rule 20(a) provides that defendants "may be joined in one action as defendants if: (A) any right to relieve is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action."

3. *In re* Diet Drugs, 294 F. Supp. 2d 667, 673 (E.D. Pa. 2003) (citing 14B Wright & Miller, Federal Practice & Procedure § 3723 at 656–57 (3d ed. 1998).

4. Greene v. Wyeth, 344 F. Supp. 2d 674, 684–85 (D. Nev. 2004).

5. *In re* Prempro Products Liability Litigation, 417 F. Supp. 2d 1058 (E.D. Ark. 2006).

6. *Id.* at 1060.

7. *Id.* (quoting *In re* Baycol Prods. Liab. Litig*.,* 2002 WL 32155269, at *2 (D. Minn., July 5, 2002)).

8. *Id.* at 1059 (quoting *In re* Diet Drugs Prods. Liab. Litig*.*, 1999 WL 554584, at *5 (E.D. Pa. July 16, 1999).

9. 395 F. Supp. 2d 395 (S.D. W.V. 2005).

10. *Id.* at 412.

11. Geffen v. General Electric Co*.*, 575 F. Supp. 2d 865, 871 (N.D. Ohio 2008). *See also* Rutherford v. Merck & Co., Inc*.*, 428 F. Supp. 2d 842, 852 (S.D. Ill. 2006) ("the *Tapscott* doctrine is an improper expansion of the scope of federal diversity jurisdiction by the federal courts.").

12. *In re* Norplant Contraceptive Prods. Liab. Litig*.*, 976 F. Supp. 559, 561 (E.D. Tex. 1997).

13. *Geffen*, 575 F. Supp. 2d at 871.

14. *See* Osborn v. Metropolitan Life Insurance Co*.*, 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004); *Rutherford,* 428 F. Supp. 2d at 852–855.

15. 28 U.S.C. § 1446(a)–(b).

16. Laura J. Hines and Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction,* 57 Ala. L. Rev. 779, 811 (2006).

17. 28 U.S.C. § 1446(b).

18. *In re* Diet Drugs, 294 F. Supp. 2d at 673.

19. *See Tapscott,* 77 F.3d at 1360 (applying federal rules without analysis); Brooks v. Paulk & Cope, Inc. (176 F. Supp. 2d 1270, 1274 (M.D. Ala. 2001).

20. *Tapscott,* 77 F.3d at 1360.

21. *Rutherford*, 428 F. Supp. 2d at 853.

22. *Id.* at 853–54 (*citing* Walton v. Tower

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Aviation Corner

Does the MMTJA Allow for More Efficient Mass Disaster Litigation?

By Andrew Harakas and Deborah Elsasser

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The Multiparty, Multiforum Trial Jurisdiction Act (MMTJA),[1] was designed to broaden federal jurisdiction to allow for the litigation—in a single federal forum—of multiple suits arising from the same mass disaster. Through a mixture of new provisions[2] and amendments[3] to the existing jurisdiction, venue, and removal provisions of Title 28 of the United States Code, the MMTJA bestows upon the federal district courts original jurisdiction over any civil action involving "minimal diversity" between adverse parties and arising out of certain types of mass disaster accidents taking place after January 31, 2003.

The MMTJA was conceived partly in response to the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,[4] where the Court held that a transferee court is without authority to assign itself the trial of a case that was transferred to the court for consolidated pretrial proceedings under the Multidistrict Litigation (MDL) statute.[5] The MDL statute does not contain authority for transferee courts to retain MDL cases beyond pretrial proceedings for purposes of trial and settlement, but for many years transferee courts routinely retained cases for those purposes.[6] One of the primary goals of the MMTJA was to amend the MDL statute to allow for consolidated liability trials for mass disaster cases, and several versions of the bills preceding the enactment of the statute contained such a provision. That provision unfortunately did not survive the final version of the statute that was enacted in 2002.

While the MMTJA removes certain federal court jurisdiction, venue, and removal constraints to allow more easily for consolidated federal court litigation of claims arising from a single mass disaster, as explained below, the MMTJA applies to a narrow class of cases. Because the MMTJA does not amend 28 U.S.C. § 1407 to allow for the transferee court to retain all MDL cases in accordance with pre-*Lexecon* standard practice, it remains unclear to what extent the MMTJA will serve the purpose of consolidation and efficient litigation of mass disaster claims. Indeed, because of the statute's narrow scope, few courts have had the opportunity to interpret and apply its provisions.

MMTJA Threshold Requirements

The MMTJA allows a plaintiff who cannot meet the complete diversity requirements to nonetheless commence an action in federal court if

(a) the minimal diversity requirement of 28 U.S.C. § 1369 is met
(b) the case involves an "accident" resulting in the death of 75 persons at a discrete location
(c) the case meets one of the following conditions
  (1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place
  (2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States
  (3) substantial parts of the accident took place in different States[7]

The minimal diversity requirement may be met between adverse parties where "any party is a citizen of another State,[8] a citizen of a foreign state, or a foreign state as defined in" 28 U.S.C. § 1603(a).[9] Assuming the above requirements are met, a lawsuit may be filed in any district in which any defendant resides or in which a "substantial part of the accident giving rise to the action took place."[10] Once the threshold requirements are met, any type of claim (e.g., wrongful death, personal injury, property damage) arising from the same accident may be filed in accordance with the venue provisions of the statute. Also, 28 U.S.C. § 1369(d) permits any person with a claim arising from the accident to intervene as a party plaintiff in any action authorized by section 1369(a).

The statutory language raises questions as to the scope of the MMTJA's application to various types of claims. To date, few courts have had the opportunity to address the scope of the MMTJA, and it remains to be seen whether courts will adopt a broad application of the statute to allow for more efficient litigation of claims arising from mass accidents or instead will narrowly construe its provisions to restrict federal jurisdiction.

What Qualifies as an Accident under the MMTJA?

The MMTJA defines accident as "a sudden accident, or a natural event culminating in an accident, that results in death incurred at a discrete location by at least 75 natural persons."[11] The legislative history of the statute confirms that the statute was designed to apply to single accident type cases, such as "plane, trains, bus, boat accidents, environmental spills" that occur in a specific location.[12] The legislative history also indicates that certain types of litigation, such as breast implant and asbestos claims, were not intended to be included within the scope of the statute.[13] Neither the statute nor its legislative history address the circumstances under which an accident must occur to qualify for application of the statute.

Several decisions from the U.S. District Court for the Eastern District of Louisiana arising out of Hurricane Katrina insurance coverage disputes have addressed the scope and meaning of the word "accident." In those cases, the courts applied a narrow interpretation of the term and repeatedly rejected attempts by insurance company defendants to remove the actions to federal court on the basis that the claims arise from an accident. The defendants argued that Hurricane Katrina qualified as an accident because it was a natural event culminating in an accident and resulting in the death of more than 75 persons in a discrete location. The courts have held in several cases that the MMTJA does not apply to claims arising from Hurricane Katrina because the hurricane, while a natural event, was not sudden and unforeseen but rather consisted of multi-day events preceded by numerous warnings of the impending storm and therefore did not qualify as an accident within the meaning of the MMTJA.[14]

In adopting a narrow definition of the term "accident," the courts have distinguished between claims arising from the breach of a single specific levee (which in certain circumstances could be deemed an "accident") from claims arising generally from hurricane conditions.[15] Because of the limited scope of review of remand orders under 28 U.S.C. § 1447(d), the Fifth Circuit has not addressed the issue on the merits. Given the multitude of circumstances under which a mass disaster event can occur and the myriad of claims that can arise from a single accident, it will be interesting to see how courts interpret and apply the accident definition to future mass disaster claims.

Limitation of Jurisdiction under the MMTJA

The MMTJA contains a "limitation of jurisdiction" provision that states as follows:

> The district court shall abstain from hearing any civil action described in subsection (a) in which
>
> (1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and
> (2) the claims asserted will be governed primarily by the laws of that State.[16]

This key provision was added late in the legislative process as a compromise to increase support for the bill and as a result, there is limited legislative history to guide the courts in interpreting the vague terminology used in the drafting of this provision.[17]

In *Passa v. Derderian*,[18] a case that arose from a fire at a nightclub in Rhode Island, the District Court of Rhode Island held that, despite its title, this provision is not a discretionary limitation on the district court's jurisdiction but rather is a mandatory abstention clause that requires the district court to abstain from hearing a case where the two specified conditions are met. The court found that the provision was intended to "safeguard" local disaster cases from federal court and allow them to be heard in state court.[19] The court also addressed the issue of what qualifies as the "substantial majority of all plaintiffs" and "defendants with direct liability" under 28 U.S.C. § 1369(b)(1). These questions had not previously been addressed by a district court in a reported decision.

The court held that the phrase "all plaintiffs" is to be construed as including all potential plaintiffs who could bring claims rather than all plaintiffs who had already commenced actions. The court defined the term "substantial majority" as "a number somewhat in excess of half of all potential plaintiffs with claims arising from the same disaster, such as two-thirds or three-fourths."[20] With respect to the question of identifying the "primary defendants," the court again created its own definition and concluded that the phrase is most reasonably construed as including those defendants with "direct liability, and excluding all defendants joined as secondary or third-party defendants for purposes of vicarious liability, indemnification or contribution."[21]

The *Passa* case clearly will not be the last word on the "limitation of jurisdiction" provision of the MMTJA. Unfortunately, the poor drafting of this provision could undermine the very litigation efficiencies that the statute was intended to achieve.

Removal under the MMTJA

Removal jurisdiction is substantially expanded for cases that meet the requirements under the MMTJA. The MMTJA adds an independent basis for removal under 28 U.S.C. § 1441(e) by permitting removal by a defendant of any action that "could have been brought in a United States district court" under 28 U.S.C. § 1369, or where

> the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.[22]

Removal of the action is to be done in accordance with the usual removal

procedure under 28 U.S.C. § 1446, except that

> a defendant may file a notice of removal before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.[23]

The removal statute was also amended to include a provision requiring remand of an action removed under 28 U.S.C. § 1441(e) to state court for determination of damages, "unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages."[24] This provision contains an erroneous reference to 28 U.S.C. § 1407(j)—a nonexistent provision—which is a remnant from a prior version of the bill that contained an amendment to 28 U.S.C. § 1407. This reference may create confusion as to the consolidation mechanisms available to the parties for removed actions under the MMTJA.

The amended statue 28 U.S.C. § 1441(e) contains a significant difference in language from the general removal statute, 28 U.S.C. § 1441(a), with respect to whether all defendants must consent to removal under 28 U.S.C. § 1441(e). The general removal statute, 28 U.S.C. § 1441(a), states that an action may be removed by "the defendant or the defendants," which is interpreted by the courts as a requirement that all defendants must consent to removal.[25] By contrast, the MMTJA removal provision does not contain the language "the defendant or the defendants" as is found in 28 U.S.C. § 1441(a). Rather, 28 U.S.C. § 1441(e) states

> Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if
>
> (a) the action could have been brought in a United States district court under section 1369 of this title; or
> (b) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.[26]

Thus, the language upon which the court-made unanimity rule is based is not present in 28 U.S.C. § 1441(e) and defendants may now argue that unanimous consent is not required for removals under the MMTJA. Additionally, a unanimity requirement seems contrary to the purpose of the MMTJA to broaden federal court jurisdiction for the efficient consolidation of cases arising from a single accident.

The statute may lead to more litigation over the scope of its application and the procedures for removal and consolidation of actions.

This issue has arisen in the context of litigation pending in the Northern District of Illinois from the May 5, 2007, crash of Kenya Airways Flight 507 near Doula, Cameroon, which resulted in the death of all 114 persons aboard the flight. Numerous lawsuits arising from the accident were filed in Illinois State Court, Cook County, against The Boeing Company, General Electric Company, GE Aviation Systems LLC, Thales Avionics S.A., Rockwell Collins Inc., Parker Hannifin Corp., and Triumph Actuation Systems-Calencia, Inc. Defendant Boeing removed each case to the United States District Court for the Northern District of Illinois on June 19, 2009, pursuant to 28 U.S.C. § 1441(e) and thereafter moved to consolidate the cases before a single district judge pursuant to the MMTJA.

In all but one of the cases, plaintiffs consented to the consolidation of the cases under the MMTJA and did not file a motion to remand. In one case, *Claisse v. The Boeing Co.*,[27] plaintiffs filed a motion to remand, arguing that the removal of the case was defective because not all defendants timely consented to the removal. Defendants opposed the motion to remand, arguing that unanimous consent of the defendants is not required for removals under 28 U.S.C. §§ 1369 and 1441(e).

On August 26, 2009, in the *Claisse* case, District Judge George Lindberg denied plaintiffs' motion to remand "because the applicable removal statute only requires removal by 'a defendant' and not by all defendants," citing 28 U.S.C. § 1441(e)(1).[28]

The week before Judge Lindberg's order, however, District Judge Samuel Der-Yeghiayan entered a contrary order in the related case of *Pettitt v. The Boeing Co.*,[29] *sua sponte* remanding the case notwithstanding the fact that plaintiffs consented to the consolidation of the case under the MMTJA and did not move to remand the case. Judge Der-Yeghiayan's order dated August 20, 2009, states

> The record does not reflect that all the defendants consented in a timely fashion for the removal before the case was removed to Federal Court. All defendants must join in a removal petition in order to effect removal.[30] The removal in this case was defected [sic] at the time of removal. Therefore, this action is remanded to the Circuit Court of Cook County forthwith. The remand is pursuant to 28 U.S.C. § 1447(c). All pending dates and motions are stricken as moot.

The defendants have filed an appeal from this remand order under the authority of a Seventh Circuit rule that

permits appellate review of *sua sponte* remand orders. In *In re Continental Casualty,* the Seventh Circuit held that a district court lacks statutory authority to remand a case that is based on a procedural defect in removal absent a motion to remand by a party.[31] Based on this Seventh Circuit precedent, the defendants in the *Pettitt* case have argued that Judge Der-Yeghiayan had no power to issue an order *sua sponte* remanding the case based on an alleged procedural defect and that the Seventh Circuit has jurisdiction to review the district court's purported "overreach" notwithstanding the limitation on appellate review of remand orders under 28 U.S.C. § 1447(d).[32]

The *Pettitt* defendants argue that they do not seek review of the substance of the district court's remand order but rather seek vacatur of the order because the district court lacked the power to remand the case. Given this posture, the Seventh Circuit may only address the issue of whether the district court had the authority to remand, and it is unclear whether the Northern District of Illinois will shed any further light on the unanimity issue in this litigation. To date, no other court has addressed removal under the MMTJA, but there are certain to be future disputes over the removal and consolidation procedures set forth in 28 U.S.C. § 1441(e).

Conclusion

While the MMTJA clearly expands the jurisdiction of the federal district courts for accidents resulting in the death of at least 75 individuals at one location, it may apply only to a narrow class of mass disasters. Thus, it is unclear to what extent the statute will serve the purpose of consolidation and efficient litigation of mass disaster claims. Judging from the few cases to address the statute to date, the statute may also lead to more litigation over the scope of its application and the procedures for removal and consolidation of actions. It remains to be seen whether the district courts will adopt an expansive application of the MMTJA consistent with its purpose to consolidate and efficiently adjudicate claims arising from mass disasters or invoke some of the statute's ambiguities to narrow its scope. ■

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Endnotes

1. 28 U.S.C. § 1369.
2. 28 U.S.C. § 1369 (Multiparty, multiforum actions), § 1697 (Service in multiparty, multiforum actions), § 1785 (Subpoenas in multiparty, multiforum actions).
3. 28 U.S.C. § 1391(g) (venue); 28 U.S.C. § 1441(e) (removal).
4. 523 U.S. 26 (1998).
5. 28 U.S.C. § 1407. H.R. Rep. No. 107-014 (March 8, 2001).
6. *See, e.g., In re* Wilson, 451 F.3d 161, 171 (3d Cir. 2006).
7. 28 U.S.C. § 1369(a).
8. "State is defined to include the District of Columbia, the Commonwealth of Puerto Rico and any territory or possession of the United States." 28 U.S.C. § 1369(c)(5).
9. 28 U.S.C. § 1369(c)(1).
10. 28 U.S.C. § 1391(g).
11. 28 U.S.C. § 1369(c)(5).
12. H.R. Rep. No. 107-014 (March 8, 2001).
13. H.R. Rep. No. 107-014 (March 8, 2001).
14. *See, e.g.,* Roby v. State Farm Fire & Cas. Co., 464 F. Supp. 2d 572, 576 (E.D. La. 2006) (citing decisions from the Eastern District of Louisiana holding that Hurricane Katrina was not an "accident").
15. *See* Flint v. Louisiana Farm Bureau Mut. Ins. Co., 2006 U.S. Dist. LEXIS 58264 (E.D. La. Aug. 15, 2006).
16. 28 U.S.C. § 1369(b).
17. *See* H.R. Rep. No. 107-014 (March 8, 2001).
18. 308 F. Supp. 2d 43 (D.R.I. 2004).
19. 308 F. Supp. 2d at 54.
20. 308 F. Supp. 2d at 60.
21. 308 F. Supp. 2d at 62.
22. 28 U.S.C. § 1441(e).
23. 28 U.S.C. § 1441(e).
24. 28 U.S.C. § 1441(e)(2).
25. *See* Chi., Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 247 (1900) ("the defendant, if there be but one . . . or the defendants if there be more than one" may remove an action).
26. 28 U.S.C. § 1441(e).
27. No. 09-03722 (N.D. Ill.).
28. Claisse v. The Boeing Company, No. 09 C 3722, Docket Entry Text (Aug. 26, 2009).
29. No. 09-03709 (N.D. Ill.).
30. Northern Illinois Gas Co. v. Airco Indus. Gases, A Division of Airco, Inc., 676 F.2d 270, 272 (7th Cir. 1982).
31. 29 F.3d 292 (7th Cir. 1994).
32. *See In re* Continental Cas., 29 F.3d 292 (7th Cir. 1994); Ill. Mun. Ret. Fund, 391 F.3d 844, 849 (7th Cir. 2004) (28 U.S.C. § 1447(d) does not deprive appellate courts of jurisdiction to vacate a remand order issued in excess of a district court's statutory authority.).

Recent Application of *Wyeth v. Levine* Preemption Outside the Prescription Drug Context

By Melanie D. Margolin and Jacob V. Bradley

Melanie D. Margolin

Jacob V. Bradley

Since the United States Supreme Court handed down its decision in *Wyeth v. Levine* in March 2009, doctors, lawyers, journalists, and bloggers have all weighed in on this landmark decision.[1] While much of this commentary revolves around the merits of the decision (the majority of which find little merit in it), few articles have addressed *Wyeth*'s general impact on the viability of the preemption defense. Although the *Wyeth* Court limited its holding to preemption of state law claims in the prescription drug labeling context, other courts have applied its reasoning to find that other state law claims are not preempted by federal law. This article examines four cases that have relied upon *Wyeth* in addressing preemption issues outside of the prescription drug context, but determines that this expansion of the *Wyeth* holding into other factual areas is not necessarily an expansion or contraction of preemption doctrine.

Background of *Wyeth v. Levine*

Before looking to a few of those cases that have applied *Wyeth* outside of the prescription drug context, it is important to understand the *Wyeth* decision itself. In *Wyeth,* Levine was a professional musician who suffered from migraine headaches. She went to her doctor seeking treatment for the pain and nausea that accompanied these headaches. Her doctor suggested the antihistamine Phenergan, which is used to treat nausea. Phenergan can be administered intramuscularly or intravenously. There are two options for intravenous administration: IV push, where the drug is injected directly into a patient's vein, or IV drip, where the drug is mixed with a saline solution and slowly administered from a hanging intravenous bag through a catheter inserted into the patient's vein. The medical staff initially administered Phenergan using the deep intramuscular injection method, which is not as effective—but is decidedly safer—than intravenous administration.

Later that day, Levine returned because the drug was not working, and the medical staff gave her another dose of Phenergan, this time through the IV push method, the most effective but also most risky method of administration. During this second dose, the drug was accidentally injected into one of her arteries. Due to the drug's corrosive nature, injection into an artery causes irreversible gangrene. Levine suffered gangrene in her arm, which she eventually had amputated below the elbow, thereby ending her professional musical career.

Phenergan has been on the market for over 50 years, and it is estimated that it has been administered over 200 million times in the United States. The chance of having a gangrenous adverse reaction is approximately one in 20 million.[2] Wyeth was aware of this risk and argued it had attempted to strengthen Phenergan's label to warn of this risk in 1988. The Food and Drug Administration (FDA) rejected this label change in 1996, instructing Wyeth to "retain verbiage in current label."[3]

After settling claims against the health center and clinician that administered the Phenergan, Levine brought common-law negligence and strict-liability claims against Wyeth. The jury awarded Levine damages under her negligence theory, and Wyeth's appeal was affirmed by the Vermont Supreme Court. Chief Justice Reiber dissented, arguing that the jury verdict was inconsistent with the FDA's conclusions that IV administration of Phenergan was safe and effective. Citing "the importance of the preemption issue, coupled with the fact that the FDA has changed its position on state tort law and now endorses the views expressed in Chief Justice Reiber's dissent," the United States Supreme Court granted Wyeth's petition for certiorari. The Court framed the issue "whether the FDA's drug labeling judgments 'preempt state law product liability claims premised on the theory that different labeling judgments were necessary to make drugs reasonably safe for use.'"[4]

The Court found Wyeth's two arguments for preemption unavailing. First, the Court held that there was no evidence that the FDA would not have approved a change in Phenergan's label and, absent such evidence, Wyeth's impossibility argument failed.[5] Second, holding that the FDA's recent position that state tort suits interfere with its statutory mandate is entitled to no weight, the Court denied Wyeth's argument that state law claims obstruct the federal regulation of drug labeling.[6]

Other Courts Rely upon *Wyeth*

Given the issue presented and the Court's holdings, it is clear that *Wyeth* was concerned with federal preemption of state tort claims only in the prescription drug context. The various articles that discuss *Wyeth*'s implications in the prescription drug context also cite to the limited holding. But at least a handful of courts around the country have relied upon *Wyeth*'s discussion of conflict preemption and applied it to other substantive areas of law. The most relevant cases are discussed in the following sections in chronological order of decision.

City of Joliet v. New West, L.P.

City of Joliet v. New West, L.P.[7] is an appropriate introduction to this section because, while the court relied on *Wyeth* for part of its holding, it did not discuss

the case in detail. In *City of Joliet*, the Seventh Circuit Court of Appeals was asked to decide whether the National Housing Act[8] and the Multifamily Assisted Housing Reform and Affordability Act[9] preempted state law and blocked the city's attempt to condemn a run-down apartment complex. The Department of Housing and Urban Development (HUD) argued that, because the purpose and findings of these statutes is to enlarge, or at least preserve, the stock of available low-income housing, the federal statutes preempted state law condemnation proceedings.

The Seventh Circuit, relying upon the Court's findings in *Wyeth*, held that the National Housing Act and the Multifamily Assisted Housing Reform and Affordability Act did not preempt state law condemnation proceedings, even though condemnation of a large, low-income apartment complex could be viewed as a contravention of the purposes and findings clauses of these statutes. The court, citing *Wyeth*, explained that "preemption inferred from a clash of goals and objectives should not be used expansively, unless the agency has issued a preemption regulation with the force of law."[10] The court pointed out that the state law did not conflict with the relevant federal statutes themselves, just the "findings" and "purposes" clauses that preceded them. The court further explained that, according to *Wyeth*, the agency's mere belief that the state law would interfere with the federal purpose is not a substitute for a regulation with the force of law.

In so holding, the court was relying upon the Supreme Court's denial of Wyeth's argument that the preamble to a 2006 FDA regulation preempted state tort claims. That preamble stated that the Food, Drug, and Cosmetic Act (FDCA) establishes "both a 'floor' and a 'ceiling,'" so that "FDA approval of labeling . . . preempts conflicting or contrary State law" and that certain state law claims "threaten FDA's statutorily prescribed role as the expert federal agency responsible for evaluating and regulating drugs."[11] The Supreme Court determined that the FDA's 2006 preamble was not entitled to deference because, among other reasons, agencies have no special authority to make preemption decisions (absent a delegation of that authority by Congress); FDA failed to follow the proper procedure for rulemaking; and this decision was contrary to FDA's historical position on preemption.[12]

The Court relied upon this analysis to determine that the purposes and findings clauses of the housing statutes did not preempt state law because there was no federal regulation with the force of law that preempted the condemnation proceeding. The Court did mention one federal regulation, but HUD did not rely on it because it expressly stated that state and local property regulations, such as building standards and zoning, were not preempted.[13] Although the court relied upon *Wyeth* to find that the state law claims at issue were not preempted, the court relied upon a part of the decision that has a universal application.

> *Wyeth* cited two "cornerstones" of preemption jurisprudence: congressional intent and the strong presumption against preemption in fields that the states have traditionally occupied but where Congress has legislated nonetheless.

Dooner v. DiDonato

In *Dooner v. DiDonato*,[14] Dooner and DiDonato were both traders on the floor of the Philadelphia Stock Exchange. DiDonato arrived to the trading floor before Dooner, set up his computer at a work station, and left the area. Dooner arrived shortly after DiDonato vacated the area and proceeded to situate himself in the same place DiDonato had set up his computer. Upon returning to the area, DiDonato grabbed Dooner from behind and pulled him backward with such force that Dooner struck his head and neck on the floor, briefly rendering him unconscious. Dooner was taken to the hospital and sued DiDonato, the Exchange, and others, seeking compensation for his injuries under theories of negligence and intentional torts. A jury awarded Dooner damages, and the Exchange filed a motion for judgment notwithstanding the verdict and/or for a new trial, arguing the state tort claims were preempted by the Securities and Exchange Act. The Pennsylvania Supreme Court granted allocatur to decide the limited issue of whether the Securities and Exchange Act preempted such state tort claims. Ultimately, the court determined that the state tort claims were not preempted.[15]

The relevant portion of the holding, for the purposes of this article, dealt with the Exchange's argument that allowing state tort claims would "eviscerate" the Securities and Exchange Act's rules and concept of self regulation. In other words, the Exchange argued that it was impossible for its rules regarding trader discipline and floor security to coexist with the state law claims. The court did not agree and, quoting *Wyeth*, stated that "impossibility preemption is a demanding defense."[16] The court found that the primary focus of the Exchange's rules regarding trader conduct discipline relate to the trading principles that protect investors and the public interest—not one trader from the violent acts of another trader. The court agreed with the Exchange that there were certain rules that addressed trader safety while on the floor and that a trader could be disciplined for violence against another trader. But the court held that state tort claims alleging actions that could subject the trader to discipline "would not in any way make such safety practices and disciplinary proceedings an impossibility or prevent [the exchange] from disciplining its traders for misconduct."[17] The court cited to the fact that DiDonato was barred from the floor for the remainder of the day and was later suspended for 10 days and fined $15,500 for his actions. Just as in *City of Joliet* case, while the court relied upon *Wyeth* in finding no federal

preemption, the court applied a long-standing principle of preemption that was reiterated in *Wyeth*.

Saleh v. Titan Corp.

In this case, two sets of Abu Ghraib prisoners brought separate lawsuits against military contractors that provided interrogation and interpretation services at the Abu Ghraib prison, seeking damages for alleged abuse. The contractors argued that the common law claims were preempted because they were claims against civilian contractors providing services to the military in a combat context.[18] The district court granted summary judgment in favor of one contractor, and the losing party in each case appealed. The cases were combined on appeal, and the United States Court of Appeals for the District of Columbia Circuit held that the state tort claims were preempted by federal law. Specifically, the court held that the exception to the Federal Tort Claims Act waiver of sovereign immunity regarding "any claim arising out of the combatant activities of the military or armed forces, or the Coast Guard, during time of war" preempted the state law claims because the contractors were involved in combatant activities. The court noted that the parties did not disagree that the contractors were integrated with the military and performing a common mission under ultimate military command. The court then established a new test to determine whether state law claims are preempted by federal law when the war-time actions of private service contractors are at issue.

The court analyzed its holding vis-à-vis *Wyeth* and determined that the two were consistent. The court explained that *Wyeth* cited two "cornerstones" of preemption jurisprudence. The first is congressional intent. The court found that the congressional intent to preempt state laws in the context of the combatant activities exception is much clearer than in the area of federal prescription drug regulation. The court was referring to the express preemption of state law claims in the sovereign immunity clause of the Constitution and the few exceptions to that immunity provided by the Federal Tort Claims Act. The second "cornerstone" is the strong presumption against preemption in fields that the states have traditionally occupied but where Congress has legislated nonetheless. Here again, the court contrasted the Constitution's explicit commitment of the nation's war powers to the federal government with the various states' regulation of dangerous and mislabeled products. Although every state has laws regulating dangerous and mislabeled products, including prescription drugs, the states have traditionally played no role in the regulation of warfare. The court found that these "cornerstones" of preemption "secure[d] the foundation of [its] holding."[19] While this case may signal an expansion of federal preemption, it is not in an area that likely has much relevance in the context of mass torts.

Cook v. Ford Motor Co.

The final case in this review comes from the Indiana Court of Appeals. In *Cook v. Ford Motor Co.*,[20] the Cooks brought a products liability lawsuit against Ford Motor Company, following a tragic accident in which their eight-year-old daughter suffered serious brain injuries when an airbag in the Cooks' truck deployed and struck her in the head. The Cooks alleged that Ford failed to provide adequate warnings regarding the airbag and its deactivation switch. The trial court granted Ford's motion for summary judgment, but on appeal, the court held that the Cooks' claims were not preempted by federal regulations.[21] The court stated that the case was more akin to *Wyeth* than *Geier v. American Honda Motor Co., Inc.*,[22] another federal preemption case dealing with motor vehicle safety standards.

The court found many similarities between *Cook* and *Wyeth*. In both cases, the plaintiffs argued that the companies should have strengthened their warnings. Both companies counterargued that following both federal regulation and state tort law would have been impossible. Also similar was the method of approval for new warnings. The court pointed out that in *Wyeth*, there was a process in which the warning could be changed at the manufacturer's request. It then explained that in *Cook*, the content of the warning was at the manufacturer's discretion and agency preapproval was not required. Finally, the court contrasted the agencies' statements regarding preemption and found that, while the FDA's statement that its regulations preempted state law claims was not given any weight by the Supreme Court, the relevant agency in *Cook* implied, if not explicitly stated, that the regulations were a floor upon which state law could build. Relying heavily on *Wyeth*, the Indiana Court of Appeals found that the Cooks' state law claims were not preempted by federal law. This case is likely the largest expansion of the *Wyeth* holding and may have a substantial impact on federal preemption doctrine in the motor vehicle context. Even so, this case does not represent a sweeping change in preemption jurisprudence with regard to motor vehicle claims.

Future Applications of *Wyeth*

Although at least four courts have applied the preemption analysis outlined in *Wyeth* in seemingly dissimilar areas of law, these cases do not appear to have significant impact on the federal preemption doctrine. While most of the *Wyeth* commentators have spoken out against the Court's holding, some going so far as to opine that the holding could "endanger your health,"[23] the cases discussed in this article are not likely to garner the same amount of publicity. Only time will tell how other courts will apply the *Wyeth* holding to expand or contract federal preemption of state law claims. ■

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Endnotes

1. Wyeth v. Levine, 129 S. Ct. 1187 (2009).
2. Richard A. Epstein, *Wyeth v. Levine Could Endanger Your Health*, Forbes.com, Nov. 11, 2008, *available at* www.forbes.com/2008/11/10/wyeth-levine-fda-oped-cx_rae_1111epstein.html.
3. *Wyeth*, 129 S. Ct. at 1192.
4. *Id.* at 1193.

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Lessons Learned from Implementing a Class Action Settlement

By Cullen D. Seltzer


Cullen D. Seltzer

Mass torts are famous for their legal battlegrounds. Fights over class certification, controlling law, discovery, bell weather trials, multidistrict litigation (MDL) transfers, preemption, and removal can happily occupy 100 lawyers for a decade or more in a single case. The lessons this article discusses are those learned after these fights are over. How do you implement a mass tort settlement?

In February 2002, Judge Kathleen McDonald O'Malley of the United States District Court for the Northern District of Ohio preliminarily approved a class action settlement in *In re Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation*, MDL No. 1401.[1] The case turned on a medical device (hip and knee prosthetics) manufacturer's liability for allegedly improperly manufactured devices that required surgical replacement. The settlement contemplated resolving the claims of approximately 40,000 class members and a settlement trust of more than $1 billion dollars. In the intervening eight years, the settlement trust has paid out essentially all its money, paid eligible class members up to 110 percent of their prescribed awards, limited transaction costs associated with implementing the settlement to about 1 percent of the trust, and processed to conclusion more than 23,000 benefit claims.

Since February 2002, I have represented James McMonagle, the claims administrator for the class action settlement in Sulzer. While it may seem like handing out a billion of other people's dollars should be easy enough, I can attest that it is far easier said than done. What follows are the lessons worth noting from the settlement.[2]

Be Fanatical about Data

Keeping track of information is important in every case, but class actions magnify problems, and nowhere more than in the task of keeping track of information. How many class members are there, where do they live, and what are their birthdays and social security numbers? Who are their heirs, doctors, authorized and emergency contacts, and lawyers? Is Mary Smith-Jones from Wilmington the same person as Mary Smith from Wilmington? If you have claims from both of those people, are they duplicate claims from one person or two separate claims?

There are at least two strategies for dealing with this problem. The first is to use the best technology you can afford to build a robust database that many people can simultaneously access. Take care to limit who can make certain types of entries in your database. Claims processors should have ascending levels of responsibility; your least-tested folks should have limited areas of responsibility that can be quickly checked for quality control. We asked junior claims processors to do ministerial data entry tasks. We asked more senior supervisors to review reports of those workers' overall performance and work product.

When confronted with a question of identity, as in the hypothetical case of Mary Smith-Jones, we reviewed claims carefully to check for similar addresses, phone numbers, or signatures. If the question could not be resolved on that basis, we put in calls to the plaintiffs' lawyers involved or the claimants directly if they were unrepresented.

In the Sulzer settlement, like in most settlements, a claimant's eligibility for benefits was a function of his or her presentation of a written claim form and accompanying documents. The claim process did not contemplate a hearing at which direct and cross-examination might clarify questions left ambiguous. So, to guard against the possibility of benefits being denied to someone entitled to them, or paid to someone who is not entitled, be fanatical about the data.

Being fanatical about data is also essential to reliably anticipating problems in the settlement. One of the main settlement benefits in the Sulzer settlement was a $160,000 payment for a qualifying hip or knee replacement surgery plus an attorney fee subsidy for represented claimants of up to $46,000. That means each qualifying surgery reduced the corpus of the trust by about $200,000. Even with a $1 billion dollar trust, claims with a value of $200,000 leave precious little margin for error. If the data regarding pending, valid, invalid, and potentially curable claims is unreliable, the claims administrator's ability to project the fund's adequacy is corrupted.

Think about Claim Processing Before the Settlement Is Final

The Sulzer settlement was preliminarily approved in February 2002 and then set for a fairness hearing in May 2002. Judge O'Malley had approved engaging Judge James McMonagle (former judge of the Ohio Common Pleas Court) as claims administrator months before the scheduled fairness hearing. Judge McMonagle's appointment was instrumental to successful implementation of the settlement. First, he has many years experience in complex mass tort cases, including work in settlement facilities. Second, he enjoys the respect of the court and class counsel from their long association with him in other contexts. Third, because of his extensive experience working in tort claim facilities, he has exceptional insight into the best practices of a successful administration effort. Additionally, the time between his appointment and the approval of the settlement gave Judge McMonagle

a few precious months to engage counsel and a claims processing facility.[3] During that window, the claims administrator had the opportunity to engage necessary insurance providers as well. Most importantly, there was time to review the administration procedures the settlement contemplated. These were largely well put together, but we identified a handful of changes we thought were important.

Significantly, the agreement was modified to permit the claims administrator to promulgate claims administration procedures after consulting with class counsel, to aid in processing claims, and to clarify ambiguities should they arise.[4] That idea that ambiguities in the interpretation of a 100-page settlement agreement would arise was inevitable.[5] For example, if a surgeon removed a prosthetic covered by the settlement from a patient and then test-fit a replacement during the same surgery, but ultimately decided a larger prosthetic was appropriate, did that removal, reinsertion, re-removal, and re-reinsertion count as a single revision surgery or two?

To resolve the question, the claims administrator promulgated a procedure clarifying that to get two surgery benefits, a patient had to undergo two separate surgeries on two separate occasions, and test-fitting a single joint with multiple prosthetics during a single surgery only entitled a claimant to a single revision surgery benefit.[6] Was this question weighted with enormous policy implications that shook the foundations of the settlement and western judicial thinking? Of course not. The claims administrator's ability to resolve the question quickly with the consent of class counsel meant implementation of the settlement was not delayed by lengthy motions briefing, argument, and proceeding in federal court. Additionally, the published claims administrator procedure made the resolution and administration process transparent for the entire settlement class.

Over the course of the settlement, the claims administrator adopted more than 30 claims administrator procedures. These touched on a range of subjects, including how to make out payment checks for certain benefit awards,[7] how to make claims for certain subrogation indemnification claims,[8] how to award attorney fee subsidies for attorneys who accepted clients after the settlement was approved,[9] and how to prosecute an appeal from an adverse benefit determination by the claims administrator to the party-approved special master.[10] If the class action settlement agreement was the statute authorizing implementation of the settlement, the claims administrator procedures were the regulatory scheme that announced the particulars of how the settlement would work.

Making the Process More Fair Is Also More Expensive

American jury trials provide robust protections for litigants' substantive and procedural rights. Opportunities to confront evidence, call for evidence, have questions reviewed on appeal, and have questions considered not only by a judge, nominated by the president, and confirmed by the Senate, but also by a jury of one's peers, are all procedures our laws extend, in part, because we recognize that important interests ought to be safeguarded by careful and strong procedural mechanisms.

The administration process must also provide claimants procedures that provide fair mechanisms for deciding which class members will receive settlement benefits. That concern was heightened in the Sulzer settlement because a class member who participates in the settlement executes a full release even if he receives no award inside the settlement. But the administration process cannot be as robust as that contemplated by the Seventh Amendment. If it were, the costs of administering the settlement for 20,000 claims would have quickly exhausted the trust's assets.

The Sulzer settlement attempted to balance those competing considerations by providing claimants no less than five opportunities to have their claim perfected and considered for a settlement award.[11] After each review, the claims administrator, or the party-approved special master, was required to explain in writing the reason for any benefit denial. Given the large stakes for each individual claimant, these protections for claimants were reasonable, but they were also labor intensive.

A banker's box of medical records and physicians' declarations may support any given claim. All of that information had to be measured for relevance and probative value against the settlement agreement's very specific eligibility requirements. In the Sulzer settlement, claimants did not have to prove their prosthetic's defect in design or manufacture as they might have been required to do at trial, but they did have to prove they were implanted with a covered prosthetic and that the product caused the injury for which they sought a monetary award. They also had to prove the severity of the injury to establish the value of their claim.

Balancing burdens of proof in this way was abundantly fair. It relieved claimants of complex, class-wide liability proof questions, but required claimants to prove their damages by tendering documents specifically required by the settlement's drafters. That fairness, though, came at a price. While we were pleased that so little of the trust's assets went to administration costs, at least as a proportion of the trust's assets, all who were concerned understood that the cheapest way to administer the settlement would be to take the total fund, divide by the total number of class members, press play on a laser printer, and be done with it in 60 days.

That would have been efficient, but it would have been unfair and possibly unconstitutional.[12] It would have treated dissimilarly injured claimants similarly, and it would have deprived class members of the opportunity to make the case why their claim merited special compensation. A simple pro rata distribution to all class members, without a concurrent review of claimant medical records, would have deprived the claims administrator of the opportunity to identify wrongful, duplicate, and even fraudulent claims.

Have a Plan for Late Claims

Late claim submissions are the bane of every administrator's existence. A late submission, the late filer argues, ought not to be penalized given the beneficent purposes of the settlement. A small delay with regard to an administrative deadline ought not to disqualify someone from eligibility for a significant settlement benefit. On the other hand, granting short extensions for any reason only has the effect of creating a new unwritten deadline with the potential for harsh disqualifying results. Moreover, paying late claims would have made it impossible for the claims administrator to know when the claims processing effort should conclude and when any residue of the trust might be distributed.

In the Sulzer settlement in particular, some claimants were entitled to discretionary awards, the amount of which was, in part, a function of available money after base claims were paid. Honoring late claim submissions would make these discretionary awards difficult to make.

We resolved early on, with the agreement of class counsel, to adopt a claims administrator procedure that used Rule 60, in its essence, as the measure of whether an untimely submission might otherwise be permissible.[13] Ignorance of a published deadline or negligence by a claimant's attorney could not constitute excusable neglect. While that rule in practice disqualified many late claims, it also ensured that the settlement trust would be used to pay valid, timely claims, and not as an indemnity for attorney malpractice.

The important lesson to draw here is to assess the economic and practical implications for late claims for a settlement and to quickly and publicly set a policy for responding to late claims.

Get Money Out the Door Quickly

Class members in the Sulzer settlement were seriously injured. The surgeries many underwent were grueling and painful. Many of their lives were forever changed by the treatment they underwent. While many stood to receive $200,000 awards, early trial verdicts before the settlement were much higher than that. Settlement participants, in short, were angry about what happened to them and came to the settlement knowing they would likely receive only a fraction of what they might win at trial if the defendants could afford to pay.

The settlement drafters sought to allay those concerns first by getting payment out the door quickly in the form of a Guaranteed Payment Option (GPO).[14] Participants in this process committed to the settlement terms even if the settlement was ultimately derailed for any reason, including appeal from any trial court approval or ultimate decertification of the class. In exchange, GPO participants were given the defendant's binding commitment to pay the class action settlement benefits as well as a quick payment of $40,000.

> The defendents, by operation of the settlement agreement, had no financial incentive to tinker with administration except to aid in the overall success of the settlement.

The notice campaign for the settlement was underway by March 2002, and the settlement was approved in May 2002. By August 2002, the first GPO checks were being mailed. In the weeks before Christmas, the claims administrator sent checks to class members totaling just under $300 million dollars. The quick, early processing bought the settlement enormous good will. Early calls and letters to the claims administrator's office were often long on anger and short on support. Subsequent callers were often quick to express gratitude or relief and to say that the settlement was a lone bright spot in a process that had been distinctive, until then, only for its figurative and literal pain.

Those nods of appreciation didn't just make all parties feel good, but they also represented a reservoir of goodwill. Later in the settlement when new appeals would delay payment of some benefits, we would draw on that reservoir. When the claims administrator explained that we were pressing for the appeals to conclude as quickly as feasible so that we could continue working to pay people fairly in the manner required by the settlement agreement, callers believed us, in part, because we had demonstrably worked so hard early on to do just that. While some appeals in 2003 and 2004 did delay some payments, not a single class member, by motion or otherwise, initiated a single proceeding collaterally attacking the settlement or its implementation during what amounted to a year-long delay in processing the most serious claims.

Make Sure the Relevant Constituencies are Well-Informed

Careful administration requires vigilance for a wide range of circumstances that could upset the settlement cart. For example, we encountered complications associated with late claims, some class members seeking de novo review of their benefit determinations in the district court and outside settlement's administrative process, greater than expected (and budgeted) claims in certain benefit categories, and lower than expected numbers of claims in other categories. Each of these required investigation, revised planning, and either a publicly announced Claims Administrator Procedure or an order from the court.

Although the claims administrator was empowered by the settlement agreement to adopt processing procedures after consulting with class counsel, as a practical matter, he never did so without class counsel's affirmative agreement. That was made easy by regular discussion with class counsel as administration issues arose.

Class counsel was Eric Kennedy from Weisman, Kennedy & Berris in Cleveland, Ohio. Also from Kennedy's firm, David Landever and Dan Goetz were engaged intently on the settlement not just before the deal was concluded, but for years afterwards. Together, they took the lead in coordinating policy positions

among the plaintiffs' bar as a whole. Similarly, David Brooks and Andrew Carpenter from Shook, Hardy & Bacon and Barry Alexander from Nelson Mullins remained active and engaged in the settlement as liaisons for the defendant. Glenn Zuckerman, with Weitz & Luxenberg, and Steven McCarthy, with Blizzard, McCarthy & Nabers, as lawyers who represented large numbers of class members and part of the court's Special State Counsel Committee, were constant and excellent sounding boards for possible settlement procedures.

These collaborative efforts were essential to the successful implementation of the settlement. Good lawyers hardly need to be told to collaborate with their adversaries when circumstances dictate, but many settlements regrettably do not enjoy that sort of collaborative effort.

Structure the Settlement to Incentivize Collaboration

Structurally, the Sulzer settlement encouraged major constituencies to work collaboratively with one another. Perhaps the most important feature of the settlement in this regard is the severe limitations it imposed on the role of the defendant. The Sulzer defendants were required to fund more than 90 percent of the more than $1 billion dollar settlement trust within six months of the settlement's approval. In exchange for the quick funding, and with less than a hundred class members who opted out of the settlement, the Sulzer defendants achieved the much-touted, and often elusive, goal of global peace. What the defendants did not get, though, speaks volumes.

Defendants did not get the right to provide documents to the claims administrator that might be relevant to a claim. They did not get the right to review claim submissions, see claimant records, audit benefit awards, or challenge a benefit award as improperly made or providing too great a benefit. Most importantly, if the settlement trust had money remaining after all claims were paid, the defendants had no right to any of it because the trust was non-reversionary.

All of this meant that the defendants, by operation of the settlement agreement, had no financial incentive to tinker with administration except to aid in the overall success of the settlement, including the appropriate payment of every dime of the settlement trust to eligible claimants. Of course, all defendants want their settlements to be successful. But allowing the defendant to participate in benefit determinations, particularly when its participation is tied to ongoing funding obligations, can create conflicting incentives. On the one hand, the defendant might seek to pay claimants to achieve the settlement's purpose of buying peace. On the other hand, a defendant might have an incentive to use its administration rights to minimize payments as a means to safeguarding its own purse. That kind of settlement may be successful, but it requires a claims administrator to contend with multiple constituencies who have some claim to the settlement trust.

Of course, the defendants' peace in the Sulzer settlement was imperfect. The defendant ultimately was required to make approximately $75 million in additional payments to the Trust. Most of these were anticipated by the settlement agreement itself in the event of greater-than-projected claim activity. In addition, a $25 million payment was the subject of some closely contested negotiations. The parties were not of a single mind on all questions.

One lesson worth drawing, though, is that a settlement ought to limit the areas where the parties, post settlement, may continue the adversarial process by other means. That does not necessarily mean a diminution in the defendant's role or an elevation of class counsel's. What it should mean, though, is that if a settlement is intended to achieve global peace, then the settlement's operating assumption should be that the parties will substantially lay down their arms.

Have a Strong and Engaged Supervising Judge

The settlement agreement in the Sulzer case vested the trial court with exclusive and continuing jurisdiction over questions pertaining to implementation.[15] Judge Kathleen McDonald O'Malley has proven a strong and certain leader. The court regularly provided strong guidance to the parties, including on how the agreement ought to be implemented (in careful accordance with its terms and purposes) and whether collateral attacks to the settlement might be encouraged.

The court also ruled quickly on issues as they arose. These ranged from review of insurance agreements to ruling on collateral challenges to benefit awards to resolving certain attorney fee disputes between class members and their counsel.[16]

The court's leadership gave the settlement a strong sense of direction and urgency. Whenever there was a choice between payment being made quickly or slowly, the claims administrator paid quickly. The court's ruling on whether certain claimants could challenge their benefit determinations after their settlement-prescribed administrative rights had been exhausted was careful and well-reasoned, explicitly endorsed on appeal in the U.S. Court of Appeals for the Sixth Circuit, and survived a certiorari petition to the Supreme Court.[17]

Conclusion

After eight years, 20,000 claims, and $1 billion dollars, there are surely lessons other than these that one might draw from the Sulzer settlement. And, it is true that some of the lessons from this case are those any of us might draw from litigation and law practice more generally. But, in this context and on this scale, these principles merit special consideration. ■

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Endnotes

1. *In re* Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation, 01-CV-9000 (N.D. Ohio) (O'Malley, J.).

2. The opinions expressed in this article are

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the author's and do not necessarily reflect the views of the parties, their lawyers, or the court that supervised this case.

3. Judge McMonagle engaged my former firm, Bowman and Brooke, LLP, to provide both services. Later, BrownGreer, PLC, performed those services when that firm was formed from Bowman and Brooke alumni in 2000. I continue to represent Judge McMonagle in the Sulzer matter, while BrownGreer continues to provide excellent claims administration services.

4. Class Action Settlement Agreement, § 4.6(i), http://sulzerimplantsettlement.com/article4.htm. Claims Administrator Procedure 1 set out the process for promulgating Claims Administrator Procedures. http://sulzerimplantsettlement.com/pdfs/CAP%201.pdf.

5. The Settlement Agreement is available at http://sulzerimplantsettlement.com/classactionsettlement.htm.

6. Claims Administrator Procedure 28 (APRS Fund Benefits if Revision Surgery Requires Multiple Procedures), http://sulzerimplantsettlement.com/pdfs/cap28.pdf.

7. Claims Administrator Procedure 2 (Payment of Settlement Benefit Checks to Class Members and to Attorneys Representing Class Members). The Claims Administrator Procedures are available at www.sulzerimplantsettlement.com/claimsadmin.htm.

8. Claims Administrator Procedure 6 (Claims Pursuant to Agreements Between Sulzer and Third Party Payors Against the Subrogation and Uninsured Expenses Sub-Fund).

9. Claims Administrator Procedure 9 (Contingent Fee Contracts Entered into after February 2, 2002).

10. Claims Administrator Procedure 30 (Procedures for Appealing a Final Determination).

11. Class Action Settlement Agreement, Article 4 (Claims Administration), www.sulzerimplantsettlement.com/article4.htm.

12. *See, e.g.,* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856–57 (1999) (noting the requirement that dissimilarly situated class members be represented separately to ensure each subgroup's interests are adequately represented).

13. Claims Administrator Procedure 29 (Extensions from Claim Processing and Submission Deadlines for Class Members), http://sulzerimplantsettlement.com/pdfs/cap29.pdf.

14. Class Action Settlement Agreement, Article 8 (Guaranteed Payment Option), http://sulzerimplantsettlement.com/article7.htm.

15. Class Action Settlement Agreement § 9.1, http://sulzerimplantsettlement.com/article9.htm.

16. *See, e.g., In re* Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation, slip op. 1:01-cv-9000 (N.D. Ohio, Apr. 2, 2003) (MDL No. 1401) (clarifying what attorney fees plaintiffs' counsel may collect from settlement awards) (*available at* http://sulzerimplantsettlement.com/pdfs/sebastien.pdf).

17. *See In re* Sulzer Orthopedics and Knee Prosthesis Products Liability Litigation, Certified Class, et al. v. Sulzer Medica, et al., and Sulzer Settlement Trust, 398 F.3d 782 (6th Cir. 2005) (affirming district court holding regarding ineligibility of late claims and that claims administration process contractually limited to extra-judicial determinations of eligibility).

Procedural Misjoinder

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Loan of Miss., 338 F. Supp. 2d 691, 695 (N.D. Miss. 2004), Barron v. Miraglia, 2004 WL 1933225, at *2 (N.D. Tex. Aug. 30, 2004), Rudder v. Kmart Corp., 1997 WL 907916, *6 (S.D. Ala. Oct. 15, 1997), Terrebonne Parish School Board v. Texaco, Inc., 1998 WL 160919 (E.D. La. April 3, 1998), Koch v. PLM Int'l, Inc., 1997 WL 907917 (A.D. Ala. Sept. 24, 1997), *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 147 S.D. N.Y. 2001)).

23. Kirkland et al. v. Wyeth et al., Eighth Circuit Court of Appeals, No. 09-1205 (consolidated with Jasperson et al. v. Wyeth et al., No. 09-1250 and Allen et al. v. Wyeth et al., No. 09-1373) (Jan. 6, 2010, slip. opinion at 19).

24. *Rutherford,* at 852–53 (*citing* Burns v. Western S. Life Ins. Co. 298 F. Supp. 2d 401 (S.D. W. Va. 2004); *In re* Rezulin, 168 F. Supp. 2d 136).

Wyeth v. Levine

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5. *Id.* at 1198.

6. *Id.* at 1204.

7. City of Joliet v. New West, L.P., 562 F.3d 830 (7th Cir. 2009).

8. 12 U.S.C.S. § 17151.

9. 42 U.S.C.S. § 1437f.

10. *Id.* at 835.

11. 71 Fed. Reg. 3934–35.

12. *Wyeth*, 129 S. Ct. at 1201–02.

13. *City of Joliet*, 562 F.3d at 835.

14. Dooner v. DiDonato, 971 A.2d 1187 (Pa. 2009).

15. *Id.* at 1190.

16. *Id.* at 1200.

17. *Id.*

18. Saleh v. Titan Corp., 580 F.3d 1, 4 (D.C. Cir. 2009).

19. Id. at *10–11.

20. Cook v. Ford Motor Co., 913 N.E.2d 311 (Ind. Ct. App. 2009).

21. *Id.* at 316

22. Geier v. American Honda Motor Co., Inc., 529 U.S. 861 (2000).

23. Epstein, *supra* note 2.

Young Lawyer's Corner

Four Critical Tips for Taking Your First Witness at Trial

By David Grenardo


David Grenardo

Opportunities to take a witness at trial can be few and far between for an attorney who is just starting out practicing law. Over 90 percent of all cases settle, and clients often demand that more senior attorneys try high-value cases. As a result, junior attorneys may find that opportunities to examine a witness at trial do not come as soon or as often as they want. In this competitive environment, a junior attorney must seek out the trial opportunities, make the senior attorneys on their cases aware of their desire to take a witness, and be prepared to do an excellent job when the opportunity arises. This article provides four crucial tips for a junior attorney who is examining his or her first witness at trial.

1 Know the Rules

You must know the rules before you can play the game. All those days in evidence class in law school may not come back to you immediately when you begin preparing to take a witness, so review and study evidentiary rules, proper objections, and hearsay exceptions. You must know the rules of evidence to determine what types of evidence and questions are acceptable. You must know what objections there are so that you can avoid them during your own line of questioning and so you can object when opposing counsel is questioning the witness for which you are responsible.

You must also be fully versed in the procedural rules governing your trial. For instance, in California, cross-examination is limited to the material covered by a witness on direct examination, while in Texas, cross-examination is wide open to any topic relevant to the lawsuit. In arbitration or an administrative trial, the rules and procedure are more flexible, so you are not as limited as in some other jurisdictions, such as California. In any event, you must understand what the rules are to develop and execute your questioning and to properly object during opposing counsel's questioning.

2 Focus on the Fundamentals

There are basic rules to questioning a witness at trial, and a junior attorney can make his or her questioning more effective and avoid major missteps by simply adhering to these rules. When you are cross-examining a witness, always ask leading questions that require a yes or no answer, never ask a question you do not know the answer to, and stay in the record, i.e., use depositions, declarations, and interrogatory responses as the basis for your questions so you always have something to impeach your witness if he or she answers inconsistently from prior testimony. Some junior attorneys get flustered when their plan to trip up the witness goes astray as they are trying something new, or they slip up and ask a non-leading question that gives the witness an opportunity to tell his or her story again, as the witness did on direct examination. Remember, on cross-examination, you are telling the story and you control the witness so long as you stay in the record and properly impeach when the witness strays from the evidence.

On direct examination, ask open-ended questions and let the witness tell the story. Open-ended questions start with "who," "what," "when," "where," "why," and "how." Questions that begin with "please describe" or "please explain" can also be appropriate provided the question asks for a specific item, such as "Please describe the condition of the car in the accident the day you bought it." Also, use responses that the witness gives you instead of asking less-effective questions, such as "What happened next?" For example, if a witness gives you a great answer (e.g., "I was shocked when I read that June 5 email and learned that the director stole the company's own money"), you can ask the witness "After learning that the director stole the company's money, what did you do?" as opposed to "What happened next?" Stick with the basics of questioning at trial, and your examination will likely go more smoothly.

3 Be Organized

Understand the case and know what testimony you need to get out of a witness on direct examination and what points and arguments you want to make on cross-examination. A good rule to follow is to set up modules or areas of testimony by topics, which include all of the questions that you want to ask on a certain topic. For example, if you want to cover damages, intent, and causation, then divide up those topics and have thoughtful questions arranged in a logical manner in each area. In some instances, you may not need to go into a certain module or area with a witness depending on how his or her testimony went on direct or what other witnesses testify to at trial. But be prepared for everything.

Speaking of which, being organized also means being prepared. During preparation of the witness for direct,

make sure you and the witness know the essential facts that you need to address in his or her testimony. That way, when the witness fails to include something in his or her answer, you can provide a prompt that does not sound rehearsed. For example, in preparation prior to trial, the witness remembered that when the crash occurred, the light was green, it was raining, and he was stopped at the crosswalk on Fifth and Main. You want the witness to testify about all of those things, but he only testifies about the color of the light and where he was. You can prompt the witness by asking, "How was the weather?" Sometimes a junior attorney will simply ask "What else do you remember?" These questions may not trigger the response you are seeking and will give no real help to a witness who may be struggling.

Also, never tell your witnesses to memorize any answers. This may result in the witnesses looking up into the air or delaying answering a question because they are trying to remember what they memorized or what they think you want them to say. Make sure to let the witness know what's important in trial preparation. It's your job to prompt the witness to elicit that testimony in a non-leading manner. You want the witness to sound prepared—not rehearsed.

Make your cross-examination as concise as possible. Although some examinations can go much longer (depending on the witness), sometimes an effective cross need only be a few questions. In any event, the trier of fact (judge or jury) will appreciate you making your points and not prolonging the process. In addition, a sharper cross will help keep you and the witness in a rhythm.

Regardless of whether you are on cross or direct, have the exhibits you plan to use ready and available in the best media that the courtroom or conference has—digital screens, overhead projector, or easel. Have exhibits for the witness, the court, and the judge, as well as the jury.

Something unexpected always happens at trial, whether a witness says or does something unexpected or the technology you plan to use doesn't function as your anticipated. Being organized, and thus prepared, allows you to deal with those surprises much easier.

4 Be Mindful of the Trier of Fact

Think about the trier of fact in everything you do. For example, position yourself and the witnesses in places that allow the trier of fact to feel the full effect of what you are trying to do. For example, if you are conducting a direct examination, you may want to position yourself right next to the jury so the witness is speaking in the jury's direction and making eye contact and a connection with them when the witness is testifying. If you are conducting a cross-examination, put yourself in the well or center of the courtroom, as you are now testifying through your questions, and you want the jurors' or judge's eyes on you.

Also, understand that if you are trying the case to a judge alone, you may not need the same emotion as you do with a jury. Nevertheless, with a judge or a jury, make sure that you keep them engaged and connect all the dots for them, allowing them to follow what you are arguing and saying by keeping the language and themes simple, yet interesting, throughout your case.

Relentlessly search out the opportunity to take a witness at trial. When that opportunity arises, follow the simple tips above to make sure you do your best at trial and to help ensure that the senior attorney and client think of you first when they need someone to take a witness at the next trial. ■

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wheelchair looking up at me about 10 feet from the door with a smile on her face.

She was old. She was frail. Her skin was tight, wrinkly, and had an odd visual texture to it—almost like an orange peel. She wore a Boston Red Sox baseball cap, an old T-shirt that had not been washed in several days, and underwear, with nothing else. She reminded me of some of the elderly women I had seen when I had visited my grandmother who was suffering from severe Alzheimer's and living at a state-run nursing home in Dallas many years earlier. I hated that place.

I wondered how old she was. The woman I was going to meet was 48 years old, according to my short-form memo. This had to be the mother of the woman I was meeting, I thought to myself.

She smiled at me, and she had this disarming tenderness about her that immediately put me at ease. "Good afternoon," I said as I reached out my hand to shake hers. "Hello, nice to meet you," as she reached out her fist, which clenched a wooden spoon.

I looked at the spoon, confused. "The lock," she said, nodding her head towards the door. I looked and there was a small locking lever on the door, and all I could figure is that she used the spoon to unlatch the door, which made absolutely no sense to me at the time. I looked at the door and turned back toward her, returning her smile, with my hand outreached and not really sure what to do.

She extended her fist with the wooden spoon closer to my hand. I had no choice but to make a move. I grabbed her wrist and in an ever-so-gently and non-threatening way shook it, feeling incredibly odd. She stopped me quickly and told me to take the spoon. As I pulled the spoon from her tight fist, I wondered why she didn't just let go. I placed the spoon on the side table closest to me. "Thanks," she said, and she

extended her same right-balled fist as though she wanted to shake my hand. I reached out and grabbed her fist, only to feel cold, hard-as-rock skin like I had never felt before.

Truly, like I was shaking the hand of a statue, there was no movement of the fingers, a solid rock-like surface of the skin, and absolutely no indentation whatsoever from my hand or fingers. It was then, and only then, that I knew this was "Debbie," the client with NSF. The woman whose hand was now permanently balled into a fist, the woman who needed a wooden spoon to unlock the door, the woman with this new man-made disease I had only heard about—nephrogenic systemic fibrosis.

She asked me if I wanted a cup of coffee. I declined even though it sounded good. We sat at her breakfast table. She motored herself over in her narrow, outdated electric wheelchair, using the knuckles of her right fist to push the small, stubby controller. I saw black marks and holes all over the walls where her wheelchair had scraped by navigating the small, tight living quarters.

We talked for the next three and a half hours. She told me her whole life story, how she was once a young, vibrant woman who managed a video game store and spent the weekends with her husband outdoors jet skiing, waterskiing, snow skiing, and sailing. She directed me to her photo albums, which documented proof of her stories. She was unrecognizable in her photos—truly a young, vibrant, beautiful woman who was full of energy and spirit.

She told me how she underwent an MRI in 2003 for her shoulder as the result of a long-time basketball injury she suffered in high school. She was on dialysis at the time and was injected with a gadolinium-based contrast agent (GBCA).

Within weeks, she noticed her skin tightening. It began in her lower legs first and several weeks later in her fingers. It was uncomfortable and "it seemed to slowly travel from my ankles up my legs and from my fingers up my forearms." She described how her skin tightened further and felt as though it was "thickening," so much so that she started having problems flexing her ankles first, then her fingers, wrists, and knees. She felt as though she was "slowly turning into stone."

She went to see her nephrologist who had no answers. He put her on pain medications, but this hardness in her skin continued traveling up her extremities. She saw a dermatologist who also had no answers.

Things would continue to progress for years without any diagnosis or understanding from any doctor she would visit. Never once did she suspect that the MRI or the dye that she had been administered beforehand played any role in this life-changing process. She quit her job a year later.

> A recent autopsy by one of our 30-year-old clients exhibited fibroblasts and calcifications throughout the entire heart, lungs, liver, and even in the meninges in the brain.

Fast forward to 2006, three years after her MRI, and her body had "completely stiffened." "I felt like I had aged 20 years," she said. Her hands had become so stiff that they were permanently fused in a fist-like position. She could not pick up a glass of water, shake a hand, unlatch the door lock, write her name, touch her husband's face with the palm of her hand, or turn the television on. She cupped her water glass with both hands and took a sip as we talked.

Her feet became permanently fused, stripping her of the ability to walk. Her knees became fixed in a permanent 90-degree angle, which meant sleeping in bed was too uncomfortable. She now slept in a recliner chair in her small, dark living room—away from her husband of 14 years.

Although I did not realize it, I must have been staring at her legs. "You keep looking at my legs," she stated. Embarrassed, I changed the subject and asked her how long she had lived in the community. She remained on subject: "My legs hurt all the time unless there is absolutely no friction against them. I cannot wear shorts or pants, because the fabric is too painful. I cannot even be near a fan, as the air hurts," she explained. I now understood why she was pantless.

"Feel them," she said. In any other situation, this was a recipe for disaster. She knew I had to feel them to better understand. I reached down and carefully touched her lower legs and watched as her calf muscle did not move a millimeter as I tried to gently compress it. I ran my hands against the skin, and it felt the same as I would expect an alligator's skin to feel—hard, leathery, bumpy, and even scaly in parts. I could see it, I could feel it, but I could hardly believe it.

She continued describing to me how this disease had changed her life, but it was nothing compared to the profound manifestation on her hands, feet, and ankles. This disease screamed doom—a literal stone case that slowly over time stole every small movement from her while leaving her mind totally intact. This was a particularly cruel signature that placed my grandmother's Alzheimer's demise in a new perspective.

An Overview of Nephrogenic Systemic Fibrosis

Nephrogenic systemic fibrosis is a rare disease that was first recognized in several patients in 1997 and first described in the literature in 2000.[1] The Food and Drug Administration (FDA) has received 780 reported cases as of September 2009. Originally, it was termed nephrogenic fibrosing dermopathy (NFD), because the fibrosing skin occurred exclusively in patients with renal failure. However, it was subsequently discovered that the skin changes can mimic progressive systemic involvement, so the name was changed.

Unlike scleroderma, NSF spares the face. Autopsy findings confirm systemic manifestations, including fibrosis of the skeletal muscle, bone, lungs, pleura, pericardium, myocardium, kidney, muscle, bone, testes, and dura.[2] NSF

patients have described their skin in a variety of ways, including "orange-peel-like," "alligator skin," and "woody texture." Those with mild or early stages of NSF often describe skin tightening in their lower extremities with some discoloration, while those in advanced stages are confined to a wheelchair, if not exclusively bedridden.

Gadolinium is a highly toxic metal and is a member of the lanthanide family. Due to its remarkable paramagnetic capability, it was ideal for the use and development in nuclear medicine during the 1970s. Each GBCA is "chelated" in a way that is unique to the manufacturer's agent. The chelation binds to the gadolinium, protecting the human body. The chelate also facilitates the removal of the agent from the body once administered.

GBCAs are excreted via the kidneys. In an adult with normal kidney function, the excretion process occurs within an hour or two after administration. In a renally impaired individual, the time period of excretion is exponentially increased.[3]

The most prevalent theory among the published literature is that the prolonged excretion period allows for the chelate to either break down or become attracted to other metals in the body, causing it to detach from the gadolinium and attach itself to others, thus leaving behind free gadolinium in the body. It has been known since the 1960s that gadolinium deposits in bone, liver, kidneys, and spleen.[4] As such, it is believed that once this deposit occurs, the body initiates an auto-immune response, which manifests itself as fibroblasts in the tissue. The fibroblasts increase throughout, which hardens and thickens the skin, thereby causing decreased mobility.

A recent autopsy by one of our 30-year-old clients exhibited fibroblasts and calcifications throughout the entire heart, lungs, liver, and even in the meninges in the brain. The coroner described it "like nothing I had ever seen."

In January 2006, Denmark physician Thomas Grobner published a paper online in *Nephrology Dialysis Transplant,* proposing an association between NSF, GBCAs, and the renally impaired. Dr. Grobner followed nine renally impaired patients, each of whom received a GBCA. Five patients developed skin thickening and induration of the skin within two to four weeks after administration.[5]

Initially there was some confusion, as Grobner's paper identified Bayer's GBCA (Magnevist) as the administering agent. In April 2006, a published addendum identified Omniscan (GE Healthcare) as the correctly administered agent.

On June 6, 2006, the FDA issued its first of three public health advisories, warning about the use of GBCAs on the renally impaired. A second and more informative warning was issued on December 22, 2006, and a black-box warning followed on May 23, 2007.

> Thirty-five percent of the cases filed have changed from a personal injury action to a wrongful death.

Perhaps as remarkable as the disease itself is the number of lawsuits that have been filed. Approximately 1,100 lawsuits have been filed across the country, representing virtually every individual who has been reported as having the disease.

Further compounding the problem both medically and legally are the pre-existing co-morbidities of all NSF patients. One must have the underlying end-stage renal disease (ESRD) to be at risk in the first place, and often those with ESRD have some, if not numerous, other co-morbidities, such as diabetes, neuropathy, and peripheral vascular disease, which further fan the flame.

The Product-ID Challenge

Product identification has proven to be a challenge in many instances and impossible in others. There are five GBCAs on the U.S. market. The first approved by the FDA was Magnevist (Bayer Healthcare Pharmaceuticals, Inc.) in 1988, followed by Prohance (Bracco Inc., 1992), Omniscan (GE Healthcare Inc., 1994), Multihance (Bracco, Inc., 1997), and Optimark (Mallinckrodt Inc., 1999).[6]

Prior to NSF, the main concern surrounding GBCAs was the potential for nephrotoxicity. Otherwise, these agents were thought to be safe alternatives to iodine contrast, which, prior to the emergence of GBCAs, was the contrast of choice.

In any product liability action, proving that your client used the product is always an issue. No less has it been in this litigation, and perhaps the reason for this is the perceived equality that health-care practitioners around the country presumed these agents to share. After all, Magnevist and Omniscan do the same thing, right? They both enhance lesions on films, presumably to heighten the contrast to allow for easier and more rapid diagnosis. If they both do the same thing, then why is it necessary to document the specific type? Is it not sufficient simply to document that the patient received "gadolinium contrast"? This is precisely what the litigation has run into time and time again.

Approximately 80 percent of the time, an imaging study will merely note "gadolinium contrast administered." Poor documentation leads the attorney to the facility in an attempt to identify which specific agent was used. This journey can be fraught with frustration. Some health care providers have long since disposed of any records indicating which agent was used or which agent was purchased, while others have the identity of the agent in a radiological logbook kept in the radiology facility. Few might have it actually imprinted on the actual film, others can narrow it down to two that they used at the time, others are completely unhelpful, and, finally, there are those that flat out tell you, "We just don't know."

This very issue has proved to be a defendant's silver bullet in many circumstances. In the federal MDL, the defendants have successfully used product ID to slow the entire litigation down. They have forced plaintiffs to exhaust method of third-party discovery before initiating any discovery against the company.

The Present State of Litigation

At present there are approximately

800 cases filed in the MDL. Of those, approximately 70 percent are Omniscan (GE Healthcare), 25 percent are Magnevist (Bayer), and 5 percent are Mallinckrodt, Inc. The first MDL trial is set for May 24, 2010.

New Jersey, California, and Pennsylvania house the bulk of the state-court activity. There are approximately 71 cases in New Jersey, 30 cases in California, and 29 cases in Pennsylvania. Other state court venues include Cook County, Illinois; St. Clair County, Illinois; Birmingham, Alabama; and Columbus, Ohio.

Although the litigation gravitates toward the MDL, the state venues have managed to move in front to some extent. The first trial setting in the country is in Cook County, Illinois, set for April 24, 2010, against GE Healthcare. Philadelphia begins trials in July. New Jersey's trial cases will begin in the spring, and California recently had a case set for May 4, 2010, against GE Healthcare. There the presiding judge granted a Motion for Preference under California Code of Civil Procedure (CCP) Section 36, a statute that allows for a trial date in 120 days, providing a showing that the plaintiff is likely not to survive beyond six months.

The first NSF case in the country was February 8, 2010, before the Honorable Curtis E.A. Karnow in San Francisco Superior Court—also a CCP Section 36 case—against Bayer. Presently, Bayer and Mallinckrodt, Inc., are settling cases. GE Healthcare recently hired "national resolution counsel," though thus far few GE cases have settled.

Perhaps the most poignant aspect of this multi-district litigation is the tremendous loss of human life. Estimates are as high as 35 percent of the cases filed have changed from a personal injury action to a wrongful death. This calls into question whether the multi-district process is the best process available to the plaintiffs with the inevitable delays fraught with so many cases and so little time. However, the MDL also establishes a process to coordinate and litigate hundreds of cases against four major pharmaceutical companies that few, if any, other processes are equipped to handle. There is no easy answer, although 2010 will be the year of trials.

Conclusion

Beyond the litigation, depositions, and bickering between counsel, there is a much broader impact on society that has nothing to do with courtrooms. I often enjoy biking to an overlook in my hometown of Newport Beach, California. There, above the bay some 500 feet, you can get away from it all, look out upon the ocean, sunsets, Balboa Island, seagulls, sailboats, and marina out into the abyss of where the deep blue ocean meets the baby blue sky. Sometimes you can time it perfectly, as though you are witnessing a Monet painting. It is a tranquil place where I can gather my thoughts and appreciate the natural beauty.

About a year ago, the city of Newport Beach commissioned a memorial to those who served and are serving in the Iraq war and had this beautiful large piece of solid black-granite rock installed right at the point for all who pass to see.

A seven-foot black-granite marine stands prominently in his full combat uniform, decked out in camouflage, flack jacket, grenades on belt, helmet on head, and M16 in hand. Half of his right arm is disappearing as it is outreached into the blackness of the black-granite wall he is about to step into. His momentum takes him forward into the symbolic unknown, but, as he steps forward, he looks behind him at the past to what is known—back to his family, back to what once was but will be no more. There is an intense look of bravery and sadness in his eyes, though he moves forward, prepared to give his life for the rest of us in the name of liberty.

Not to detract from the meaning of the statue as it relates to our brave soldiers, but I often look at that statue and think of the many men, women, and children who have had and are suffering from NSF. The symbolism behind the soldier never fails to remind me of the brave yet fearful people I have met with NSF. They too are walking forward into blackness. A place of unchartered medical territory where they—and those that have come before them—are establishing what is now known, and will be known, about this disease and the lives it takes with it. They are the faces of people who have valiantly fought to maintain some semblance of peace, life, and normalcy while battling their body everyday. Each of them is mapping the medicinal unknown. ■

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Endnotes

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